

1 like her to wait outside.

2 The Court: Do you have anything further from
3 this witness?

4 Ms. Kelber: No, Your Honor.

5 The Court: All right. Ma'am, please step down
6 and wait outside the courtroom. Who is your next witness?

7 Mr. Wu: Officer Olivarez.

8 The Court: All right. Bring in the jury.

9 (Whereupon, the jury was returned to the courtroom.)

10 Vincent Olivarez was called as a witness by the state
11 of Texas and, having been duly sworn, testified as follows.

12 Direct examination by Mr. Wu.

13 Q Officer Olivarez, could you introduce yourself to the
14 jury?

15 A My name is Vincent Olivarez.

16 Q Who do you work for?

17 A The city of Houston Police Department.

18 Q And how long have you been a police officer?

19 A At the end of this month will be 10 years.

20 Q Okay. Are you a certified peace officer?

21 A Yes, sir.

22 Q Did you happen to investigate a case of indecent
23 exposure on or about November 5, 2010?

24 A Yes. I did.

25 Q Did you go out to this location?

1 A Yes. I did.

2 Q Was this location in Harris County, Texas?

3 A Yes. It is.

4 Q Was this location 8814 Mathis?

5 A Yes, sir.

6 Q What did you do once you got there?

7 A Which time, the very first time I went out there to
8 attempt to locate Mr. Tristan?

9 Q Yes.

10 A The very first time I went out there, I was not able
11 to locate Mr. Tristan. I knocked on the door and there was no
12 one there. I'm sorry, I did locate Mr. Tristan. I went out
13 there and talked to him...

14 Q Stop right there. Now, before this, did you take
15 statements from the witness?

16 A Let me refer to my notes. I believe I did. Yes. The
17 first time, I spoke to the complainant. That was on the 12th.

18 Q And you took a statement from her?

19 A Yes.

20 Q What was your next course of action?

21 A I went out to 8814 Mathis and I located Mr. Tristan.
22 I explained to him why I was there at his residence and the
23 accusations against him.

24 Q And how did he respond?

25 A He stated that he did no such act.

1 Q Just point-blank, didn't happen?

2 A Yes.

3 Q What happened next?

4 A I asked him if it was possible that the incident did
5 occur and I made him understand that what he does in his own
6 residence is his business, just to be mindful of the blinds.
7 There was a small dog in the house and I asked him if it was
8 possible that the dog may have chewed on the blinds, raising
9 them while he was doing that incident. He stated, no, that he
10 wouldn't need to do that. He said, his wife doesn't deprive
11 him and, besides, what would he get out of doing that act in
12 front of someone else.

13 Q So, he flatly denied that anything like that happened?

14 A That's correct.

15 Q How did you identify Mr. Tristan as the person
16 identified by the complainant?

17 A When I went and spoke to Mr. Tristan or before that?

18 Q Before that. How did you know you were talking to
19 Mr. Tristan?

20 A They told me which apartment Mr. Tristan lived in.

21 Q At any point did you have the complaining witness
22 identify Mr. Tristan in any other way?

23 A Other than the photo array?

24 Ms. Kelber: Judge, the same objection.

25 The Court: I sustain your objection.

1 Ms. Kelber: I'd ask that the jury be instructed to
2 disregard the statement.

3 The Court: I'll remind the jury that you are to
4 base your verdict solely on the evidence that you've heard.

5 Ms. Kelber: I would move for a mistrial.

6 The Court: That will be denied.

7 Q What is your process for identifying a person by
8 name and by site?

9 A First, we ask the complainant if they know the
10 individual by site and by name. Then, from there, if they do
11 know them by sight and by name, we ask them how. Are they a
12 neighbor, acquaintance, or friend, or spouse, or any other
13 relation. From there, what we do is, we will get a photo for
14 our self to get a look at the person then, so when we go to that
15 persons place, we know who we're speaking with and then, we
16 identified them through a drivers license or some type of ID.

17 Ms. Kelber: Same objection, Your Honor.

18 The Court: Overruled.

19 Q Did you follow the same process in this case?

20 A Yes.

21 Mr. Wu: May I approach the witness, Your
22 Honor?

23 The Court: Yes.

24 Q I'm going to show you what has been previously
25 marked as State's Exhibits five and six. Without telling us

1 what they are, can you take a look at them?

2 A Yes.

3 Q This is five and this is six. Do you recognize these?

4 A Yes. Five is going to be the photograph
5 admonishment which we show to all complainants and witnesses
6 prior to showing them the photo array. We ensure that they
7 understand everything in there, that it is just as important to
8 remove someone not guilty or innocent as it is putting someone
9 who's guilty into jail. Number six is going to be the basic
10 photo array that we use. It's always made up of six males or
11 females that fit the same characteristics of the suspect or
12 person in question.

13 Q Now, how do you go about finding the other photos
14 to use?

15 A Normally, we will go into the HPD database, if they
16 have been arrested by HPD, they have photos. We will use
17 those photos that have the same characteristics. Or, in this
18 case, since we did not have an HPD photo array, it was the
19 county process that we used. They are the ones that made up
20 this photo array.

21 Q And, looking at these photos, are these people who...
22 what are the gender of all the pictures on here?

23 A They are all males.

24 Q Do they have a similar build and facial structure?

25 Ms. Kelber: Objection, leading.

1 The Court: Overruled.

2 A Yes.

3 Q Is their hairstyle, roughly the same?

4 Ms. Kelber: Objection, leading.

5 The Court: Overruled.

6 A Yes.

7 Q And I see markings under the eyes of each person.

8 What is the purpose of the markings?

9 A The purpose of the markings is, some defendants that
10 we have photos of may have tattoos that are not common to the
11 normal way of life. I guess people put tattoos on either their
12 neck face or four head or somewhere like that. In this case,
13 the photo that was used from the county, the defendant had a
14 couple of tattoos on his face and neck, therefore, the lines that
15 were placed on the other photos here, had to be placed on there
16 as well. This was done by the County photo array people.

17 Q When you say County photo array people, is that like
18 a separate group that just does this?

19 A Yes. They provide that. I'm not sure if you all are
20 familiar with the photo lab at HPD. They normally make our
21 photo arrays if the person has an HPD number and we cannot
22 find a good photo to use as they are used to doing all of that.
23 They have better equipment that they can block out tattoos and
24 such. You cannot do that from a regular computer. We let
25 them do that.

1 Q Did this defendant have tattoos on his face?

2 A Yes.

3 Q And where are they located?

4 A One, I believe, is under his eyes, somewhere. And
5 the other is on his hand.

6 Q Does he have one or two under his eyes?

7 A That, I don't remember offhand. Is it okay if I look
8 at the defendant?

9 Q That's okay. Now, is this a true and correct copy of
10 the photo lineup that you used with the witness?

11 A Yes.

12 Q Is this the original?

13 A The photo array is going to be original. The
14 admonishment, our division kept the original.

15 Q So, states number five is a copy and number six is an
16 original?

17 A That's correct.

18 Mr. Wu: Your Honor: I am tendering states five
19 and six to the defense for inspection.

20 Ms. Kelber: May I take this witness on voir
21 dire, Your Honor?

22 The Court: Sure.

23 Voir dire examination by Ms. Kelber.

24 Q Officer Olivarez, the prosecutor has talked to you
25 about the proper procedure and the procedure that you use.

1 Correct?

2 A Yes.

3 Q And he's talking about all of the similarities,
4 obviously, to the photos. Right?

5 A Yes, ma'am.

6 Q And, the similarities are to increase the chances that
7 the defendant will correctly identify somebody. Right?

8 A No, ma'am.

9 Q The similarities in the photos would increase the
10 chances that the identification would be correct. Isn't that
11 correct?

12 A They are put in there so the defendant would have a
13 chance of not being picked, as well, as it states in the photo
14 admonishment. It states in there that they have similar
15 characteristics of the person and the person may not be in the
16 photo array.

17 Q And, in fact, you were questioning her about Mr.
18 Tristan. Is that right?

19 A Yes, ma'am.

20 Q You interviewed her about Mr. Tristan before you
21 ever showed her the photo lineup. Is that correct?

22 A Yes, ma'am.

23 Q And, isn't it true that there is only one photo in this
24 entire lineup that has a name?

25 A That's correct.

1 Q And that name is Tristan.

2 A That's correct.

3 Q Doesn't that prejudice the lineup as a means of
4 identifying somebody or even associating somebody with a
5 name because, it's right there for them to see?

6 A No, ma'am. When the photo array is displayed, there
7 is a sheet that is placed over that and only the photos of the
8 six people are shown. The numbers or names or anything else
9 at the bottom is not shown. It's a grid.

10 Q And isn't it true that there is only one with a circle
11 around it?

12 A Yes, ma'am. That was done by the complainant.

13 Ms. Kelber: I will withdraw my objection on the
14 basis that I had originally made.

15 The Court: All right.

16 Mr. Wu: May we introduce into evidence,
17 number six?

18 The Court: It'll be admitted.

19 Mr. Wu: May we publish it to the jury?

20 The Court: Sure.

21 (Whereupon, states exhibit six was published to the jury.)

22 Q Real briefly, this is the admonishment that was given
23 to the witness. Is that correct?

24 A Yes, sir.

25 Q And, it actually tells you in English and Spanish that

1 this person may not be in the photo lineup.

2 A That's correct.

3 Q We are now looking at states number six. Defense
4 counsel asked you earlier about the circle around one of the
5 pictures?

6 A Yes.

7 Q What picture is that on?

8 A That is the defendant. The first one.

9 Q Is that the person who is in the courtroom today?

10 A Yes, sir.

11 Q Can you point him out? What's he wearing?

12 A He's wearing a black shirt and, I believe, greenish
13 colored pants and he's got his hair pulled back.

14 Mr. Wu: Your Honor, let the record reflect that
15 the witness has identified the defendant.

16 The Court: The record will reflect that the
17 witness has indicated to the person seated next to counsel.

18 Q Did you find out what his name was?

19 A Yes.

20 Q What was his name?

21 A Michael Tristan, Michael Anthony Tristan, if I'm not
22 mistaken.

23 Mr. Wu: Pass the witness, Your Honor.

24 Cross examination by Ms. Kelber.

25 Q Officer Olivarez, my name is Catherine Kelber. I am

1 the defense attorney for Mr. Tristan. How are you?

2 A I'm doing fine. Yourself?

3 Q Pretty good. Thank you. Now, as far as this alleged
4 incident, you weren't out there. In fact, didn't Mr. Tristan
5 volunteer some statements about the alleged incident?

6 A Initially, it was just a denial. And, it wasn't, if I'm
7 not mistaken, he never offered any information. Initially, it
8 was the denial. When I made contact with him again, via
9 telephone, it was, what more is there to speak about.

10 Q Well, isn't it true that he said he felt there was a
11 motive for the accusation? Did he say something about some
12 reasons that he thought this accusation had been made?

13 A I believe he did say something to the nature that he
14 may have gotten into an argument or something like that with
15 somebody around the complex. Yes.

16 Q You did not note that in your offense report. Did
17 you?

18 A No, ma'am.

19 Q Your offense report contains an account of this
20 incident. Is that correct?

21 A Yes, ma'am.

22 Ms. Kelber: At this time, I would ask to see the
23 offense report for purposes of questioning.

24 (Whereupon, a copy of the offense report was provided to
25 defense counsel. The jury was removed from the courtroom.)

1 (The jury was returned to the courtroom.)

2 Continued cross-examination by Ms. Kelber.

3 Q Officer Olivarez, before the break, you acknowledged
4 that Mr. Tristan had said something about an argument as a
5 motive. Okay? As you put it, an argument. Wasn't that
6 something that would be important to look into?

7 A Well, he didn't specify who it was with, so I couldn't
8 confront them.

9 Q Right. However, in fact, this was seven months ago
10 that you went out and investigated. Is that correct? Back in
11 November?

12 A This was back in November, 2010.

13 Q Did you review any notes that you made in
14 preparation for your testimony?

15 A While I was in the room, I read over the report that
16 is similar to the one you have in your hands.

17 Q You read through the offense report?

18 A Yes, ma'am.

19 Q Okay. But, you have no other notes or anything?

20 A No, ma'am.

21 Q Nothing else was reviewed?

22 A No.

23 Q And, at this point, you have very little independent
24 memory of what happened or didn't happen. Right?

25 A Just what I remember from here, yes ma'am.

1 Q So, if it's not in the report, it may be hard to
2 recollect. Is that correct?

3 A I would say not because, I did remember, when you
4 asked me the question, that he told me about an argument, a
5 conflict at the apartment complex, I was able to remember that
6 even though it's not in the report.

7 Q And, did you ask what the argument was about?

8 A I don't believe so.

9 Q Did he tell you about some bikes being stolen from in
10 front of his house?

11 A No, ma'am. I don't believe he did.

12 Q Did he talk to you about his concern, rightly or
13 wrongly, undocumented workers living in the complex?

14 A No, ma'am.

15 Q Did he talk to you about his concerns that there was
16 loud music late at night and somebody had called the police
17 regarding that incident?

18 A I don't recall his saying that.

19 Q Did he talk to you at all about complaints to the
20 management about the conditions at the apartments, that he
21 had?

22 A No, ma'am.

23 Q In fact, this is a small, if not tiny complex. Isn't it?

24 A Yes, compared to other complexes.

25 Q And it is virtually all Hispanic. Isn't it?

1 A That, I do not know. I'm not very familiar with the
2 complex. We do not get too many calls to that complex.

3 Q Would you agree that it's probably 10 or 11
4 apartments, at most?

5 A Roughly. Somewhere around there.

6 Q Now, in the course of your investigation, you took
7 pictures. Is that correct?

8 A Yes.

9 Q You took pictures of... and that was, in fact, when
10 you were speaking to Mr. Tristan. Is that correct?

11 A That's correct.

12 Q You took pictures of the complex and where the
13 buildings were. Is that correct?

14 A That's correct.

15 Q And those, to your knowledge, those actual pictures
16 that you took, to your knowledge, are with the DA. Aren't
17 they?

18 A That's correct.

19 Q So, they could be presented here?

20 A That's correct.

21 Q Now, in fact, did you not ask Mr. Tristan to stand by
22 his window?

23 A I did.

24 Q And, he did that.

25 A He did.

1 Q And you went outside and looked.

2 A Correct.

3 Q And all this time your goal is to take pictures.

4 Right?

5 A Yes.

6 Q And, in fact, you said you could see him. That's
7 what you say in your report. Is that correct?

8 A Correct.

9 Q But, there aren't any pictures that you took that show
10 you can see him.

11 A No.

12 Q Wouldn't that be desirable for this jury to see.

13 Okay, here, I am a police officer and I am presenting you with
14 proof, I had the opportunity and here is this guy, standing at
15 your instruction, by the window. Correct?

16 A Correct.

17 Q You are outside taking pictures and you don't have a
18 picture to show that, yes, you could see him.

19 A Correct.

20 Q Now, did Ms. Sanchez show you identification?

21 A Ms. Hernandez?

22 Mr. Wu: Objection, Your Honor.

23 The Court: Sustained.

24 Q Officer, I need to ask you about some things and I
25 don't know the details. But, did you have some disciplinary

1 issues?

2 A Did I have disciplinary issues? No.

3 Q Did you not have a complaint on or about February,
4 2008 for misconduct?

5 Mr. Wu: Objection, Your Honor. This is
6 improper.

7 The Court: Come up.

8 (Whereupon, a discussion was held at the bench and out of
9 the hearing of the jury.)

10 The Court: It has been a long-standing rule in
11 this Court that if there are any personnel issues with the
12 Houston Police Department, you show it to me first. Does this
13 complaint have any probative value to this case?

14 Ms. Kelber: I don't know. I wasn't able to get
15 any details in time. So, I don't know.

16 Mr. Wu: Objection, Your Honor.

17 The Court: Sustained. Let's move on.

18 Ms. Kelber: May I have just a second, Judge?

19 The Court: Sure.

20 Q Officer, did you make a note of what part was visible
21 from the window, that you saw?

22 A I'll refer to my notes.

23 Q Excuse me, Officer. Would that be the offense report
24 that you are referring to?

25 A Yes. The offense report, I'm sorry. Yes. It's here.

1 Would you like me to read it, ma'am?

2 Q Where is it?

3 A It's going to be where it says, page 2.009.

4 Q Yes.

5 A Toward the bottom of the second paragraph it states,
6 I had Tristan stand by his window to see if his waist
7 area/genitals could be seen from outside. Tristan could be
8 seen.

9 Q But, he was not naked at that point?

10 A No, ma'am.

11 Q Not exposed?

12 A No, ma'am.

13 Ms. Kelber: I pass the witness.

14 Mr. Wu: Briefly, Your Honor.

15 Redirect examination by Mr. Wu.

16 Q Officer Olivarez, this apartment complex, it's a
17 regular apartment complex?

18 A By regular, do you mean... it's a single-story
19 complex.

20 Q It's a normal, family area complex?

21 A Yes.

22 Q And, there are people usually walking around?

23 A There wasn't very many people walking around when
24 I was there.

25 Q When you were there, there were not?

1 A No, sir.

2 Q But, normally there are families with children living
3 there?

4 A Yes, sir.

5 Q And, the window that you saw...

6 Mr. Wu: May I approach the witness, Your
7 Honor?

8 The Court: Yes.

9 Q Defense counsel asked you about pictures that you
10 took.

11 A Yes.

12 Q Can you take a look at states one, two, three, four,
13 and five?

14 A Okay.

15 Q Do they look familiar?

16 A Yes.

17 Q Are these the pictures that you took?

18 A Yes.

19 Q Let's take a look at states number one. Which one is
20 his window?

21 A It's going to be this one right here.

22 Q The one in the middle?

23 A Yes.

24 Q Okay. Is this window clearly visible to everyone in
25 that area?

1 A Yes.

2 Q Is it visible to anyone who may be just walking by
3 the area?

4 A Yes.

5 Mr. Wu: Pass the witness, Your Honor.

6 Ms. Kelber: Nothing further, Judge.

7 The Court: All right. May this witness be
8 excused?

9 Mr. Wu: Yes, Judge.

10 The Court: Alright. How long is your next
11 witness? Don't say, not long.

12 Mr. Wu: The state rests, Your Honor.

13 The Court: All right.

14 Ms. Kelber: May we proceed, Your Honor?

15 The Court: No. Folks, it's storming out there
16 and I'm going to give you all the opportunity to leave. We will
17 continue this trial in the morning. I'm going to ask you all to
18 be here by 10:15. We will try to finish this up tomorrow. So,
19 I'll see you in the morning. Have a good evening.

20 (Whereupon, the trial was recessed for the evening.)

21 The Court: All right. Bring in the jury.

22 (Whereupon, the jury was returned to the courtroom.)

23 The Court: Good morning, folks. All right,
24 Counsel, you may proceed.

25 Ms. Kelber: Thank you, Your Honor. We call